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The Proposal for an EU Directive on adequate Minimum Wages and its impact on Italy

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Abstract

This contribution aims to assess the effects on the Italian legal order of the proposed directive of the European Union on minimum wages. The approach adopted in the research was that of the legal-regulatory analysis of the provisions of the proposal and their effects on the Italian statutory and collective sources. The approval of the directive would require the Italian legislator to take transposition action even if it were not decided to introduce legislation on minimum wages. The research has the limit of placing a proposal for a directive at the centre of the investigation which is not known whether and in which version it will be approved but the contribution constitutes a useful tool available to the European and domestic legislators to understand the constraints and potential of regulatory intervention on the matter. The original features of the research are represented by the delimitation of the boundaries of the Union's competence in the field of remuneration and the interaction between the EU and Italian legal dimensions.

Keywords: Minimum Wages; EU Competence; Collective Bargaining; Statutory Intervention.

1. The background of the proposal for a directive.

Examining the proposal for a directive on adequate minimum wages of 28 October 2020[1] means first of all asking the question of whether the European Union has the competence to regulate the matter. To answer this question, however, it is useful to take a step back.

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[1] COM(2020)682 final .

In January 2020, the Commission, according to Article 154.2 TFEU, before submitting proposals in the field of social policy, consulted the social partners on the possible direction of Union action. The Commission asked them if they considered: 1) the profiles and possible areas of intervention; 2) necessary action on those profiles; 3) the advisability to start a dialogue based on Article 155 TFEU.

The profiles on which the Commission requested the opinion of the social partners were clear while the plot of a regulatory intervention was inevitably undefined because it is at the end of the second (possible) consultation that the Commission consults 'management and labour on the content of the envisaged proposal'.[2] In the meantime, the Commission confined itself to declaring that any action should be geared towards improving working conditions, combating poverty in employment relationships and developing a level playing field for businesses in the single market, without indicating the tools to achieve those aims.

This consultation ended on 24 February 2020 and, after having assessed the positions of the social partners, the Commission, with a document dated June 6 of the same year, in the application of the principle of vertical subsidiarity, considered that an action by the Union was appropriate and started the consultation on the content of the proposal.[3] The document through which the second consultation phase was set in motion contains the answers to the questions posed previously. The most discussed topic was minimum wage, which saw European workers' unions and the business associations on opposite sides. According to the former, there would be room for Union action in that matter and specifically in two main fields: 1) the promotion and protection of collective bargaining (sectorial and inter-sectorial) and 2) the increase of minimum wages. On the contrary, all the consulted business organizations, except CEEP, have expressed their opposition to a possible binding initiative in the field of wages, pleading the lack of competence of the Union. According to the opinion of the business organizations, such a problem would not arise if a non-binding form of intervention was utilised.

At first, the Commission did not take a position on the regulatory instrument to be adopted but proposed two possible paths, namely a directive on working conditions, with contents to be specified, or a Council recommendation inviting the Member States to ensure fair minimum wages.

As far as the second consultation is concerned, the social partners were urged to comment on the aims and regulatory instruments to be used for the action of the Union. Moreover, the social partners were requested about the willingness to proceed or not with the attempt to conclude a collective agreement, according to Article 155 TFEU, aimed at achieving the main aim identified by the Commission, which was to ensure a fair minimum wage for all

[2] Article 154.3 TFEU. *See* Lo Faro A., *L'iniziativa della Commissione per il salario minimo europeo fra coraggio e temerarietà*, in *Lavoro e Diritto*, 3, 2020, 547 ff.

[3] *See* Delfino M., *La reinterpretazione del principio di sussidiarietà orizzontale nel diritto sociale europeo*, in *Diritti Lavori Mercati*, 1, 2020, 156-169; Dorssemont F., Lörcher K., Schmitt M., *On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case*, in *Industrial Law Journal*, 48, 4, 2019, 571-603; Van Malleghem P.A., *Alcune considerazioni sulla sentenza Epsu nella prospettiva del diritto costituzionale dell'Unione europea*, in *Diritti Lavori Mercati*, 3, 2020, 577-601; Lo Faro A., *Articles 154, 155 TFEU*, in Ales E., Bell M., Deinert O., Robin-Olivier M. (eds.), *International and European Labour Law*, Nomos Verlagsgesellschaft, Baden Baden, 2018, 165-176; Tricart J.P., *Legislative implementation of European social partners agreements: challenges and debates*, Working paper, 09, 2019, European Trade Union Institute, Brussels.

workers in the Union, capable of allowing a decent life whatever the kind of job that was performed. As it is known, it is at this point that the parties decided to stop the social dialogue on the matter and the Commission presented the proposal for a directive of October 2020.[4]

2. The disputed competence and the 'toolbox' shared between the Union and the Member States.

The issue of competence remains very topical also regarding the proposed directive, although the Commission deals with it rather hastily. As a matter of fact, in the explanatory memorandum, you can read that the secondary source would be 'based on Article 153(1) (b) of Treaty on the Functioning of the European Union (TFEU), which prescribes the Union to support and complement the activities of Member States in the field of working conditions, ... Since it does not contain measures directly affecting the level of pay, it fully respects the limits imposed to Union action by Article 153(5) TFEU'. Moreover, in the application of the principle of subsidiarity, the memorandum explains that 'while pay at national level falls unequivocally under the competence of the Member States, the large differences in standards for accessing an adequate minimum wage are part of working conditions, and create important discrepancies in the Single Market, which can be best addressed at Union level'.

In short, the idea is to move along the crest between pay as a working condition, falling within the competence of the Union, and pay in general, attributable to the prerogatives of the Member States.

This is what those who distinguish between pay as a social obligation, linked to working conditions and pay as compensation, on which the competence of the Union is excluded, try to do.[5] Such a reconstruction is appreciable even if it implies a further opening to the social dimension of the Union, which is too optimistic to sustain in this particular historical period. The representation of pay as a 'box' from which it is possible to extract only some 'tools' while some others must remain in the 'toolbox' of national legal orders will prove very useful.

Some other scholars[6] refer to the difference between direct (prohibited) and indirect (permitted) interference by the European Union in the matter of pay. An approach of this kind is based on three profiles: 1) the *Laval* judgment of the Court of Justice of 2007,[7] which required Sweden to change the national rules on strikes, another matter excluded from the competence of the Union; 2) the fact that the Member States shall respect the principle of non-discrimination between men and women (and for other reasons) also in matters of pay;

[4] On the change of pace of the European Union represented by the proposed directive, *see* Treu T., *La proposta sul salario minimo e la nuova politica della Commissione europea*, in *Diritto delle Relazioni Industriali*, 1, 2021, 1-25.
[5] Zoppoli L., *Sulla proposta di direttiva del Parlamento europeo e del Consiglio relativa a salari minimi adeguati nell'Unione europea del 28.10.2020 – COM(2020) 682 final*, Memorandum for the Labour Commission of the Italian House of Representatives (4.12.2020).
[6] Bavaro V., Borrelli S., Orlandini G., *La proposta di direttiva UE sul salario minimo adeguato*, Memorandum for the Labour Commission of the Italian House of Representatives, 2020. On the same wavelength, Treu T., nt. (4), 8-11.
[7] CJEU (Grand Chamber), Case C-341/05, *Laval un Partneri Ltd* [2005].

3) the conclusions of the Advocate General Sánchez-Bordona of 28 May 2020 concerning the claim by Hungary to annul Directive 2018/957 on transnational posting of workers. According to those conclusions Article 153.5 prevents the Union only from adopting measures that '*would amount to direct interference by the EU legislature in the determination of pay. That would be the case if there were an attempt to standardise, in whole or in part, the constituent elements of pay or the level of pay in the Member States*'.[8]

On closer inspection, however, it is possible to make some clarifications regarding each of the profiles described above.

1) Sweden has indeed intervened on its domestic legislation on strikes (and collective bargaining) but this has happened because that legislation risked conflicting with the fundamental freedoms of the Union and in particular with the freedom to provide services. This is the meaning of the sentence in which the Court of Justice, in the *Laval* case, rules that 'in the areas in which the Community does not have competence, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue, [though] they must nevertheless exercise that competence consistently with Community law'.[9]

2) The reference to anti-discrimination law is pertinent but needs to be better investigated. Indeed, one thing is an intervention of the Union in a matter in which it has no competence by providing for some regulation, while it is quite another to ensure the prohibition of discrimination or to provide for less favourable working conditions, including pay, on grounds of sex, race, religion, age, etc. A similar argument can be made for the directives on atypical work and the application of the principle, therein, of equal treatment to comparable full-time and permanent workers. This issue, as it is known, was addressed by the *Del Cerro Alonso* judgment of the Court of Justice,[10] according to which 'the question whether in applying the principle of non-discrimination laid down in clause 4.1 of the framework agreement, one of the constituent parts of the pay should, as an employment condition, be granted to fixed-term workers in the same way as it is to permanent workers does come within the scope of Article 137.1.b EC [now Article 153.1.b TFEU] and therefore of Directive 1999/70 and the framework agreement adopted on that basis'.[11] Furthermore, as regards to discriminatory reasons on the grounds of sex, one has to remember that Article 153.5 had coexisted for a long time with Article 157 TFEU, according to which the Member States shall ensure the application of the principle of equal pay for male and female workers for the same work or work of equal value, without anyone ever doubting that the latter provision contrasts with the exclusion of competence in the matter of pay.

[8] Conclusions of Advocate General Sánchez-Bordona, paragraph 92. The italics are mine.
[9] Laval, paragraph 87.
[10] CJEU (Grand Chamber), Case C-307/05, *Del Cerro Alonso v. Osakidetza-Servicio Vasco de Salud* [2005]. On these profiles, *see* Ales E., *Article 153 TFEU*, in Ales E., Bell M., Deinert O., Robin-Olivier M. (eds.), *International and European Labour Law*, Nomos Verlagsgesellschaft, Baden Baden, 2018, 155-165.
[11] CJEU (Grand Chamber), Case C-307/05, *Del Cerro Alonso v. Osakidetza-Servicio Vasco de Salud* [2005], paragraph 47. *See* Barbera M., *Osservazioni sulla proposta di direttiva della Commissione relativa a salari minimi adeguati nell'UE – COM(2020) 682 final*, Memorandum for the Labour Commission of the Italian House of Representatives, 2020.

3) The judgment of the Court of Justice,[12] which the conclusions of the Advocate General reported above refer to, does not seem to be as reassuring, as the Court does not rule on the profile of competence.

Hungary asked the Court to annul Directive (EU) 2018/957 by underlining that 'Article 153(2) (b) TFEU could have constituted an appropriate legal basis since the contested directive legislates on issues that fall within the scope of that provision more specifically than within the scope of Articles 53 and 62 TFEU',[13] concerning the freedom of establishment and the freedom to provide services respectively. However, the Luxembourg judges disagree with this assumption.[14] Furthermore, Hungary plead a violation of Article 153.5 since 'the contested directive imposes the application of mandatory rules under the law or national practices of the host Member State'.[15] The Court of Justice, while not agreeing with this ground of appeal either, does not rule on the issue of competence of the Member States, preferring laconically to state that there is no violation of the directive since it is true that 'Article 153(5) TFEU provides for an exception to the competences that the Union derives from the initial paragraphs of Article 153' but it is also undeniable that such paragraphs 'cannot serve as the legal basis for the contested directive and are not, therefore, applicable'.[16] Therefore, this decision cannot be used to support the thesis of the compatibility of the regulation of some aspects of pay with the exclusion of competence of the Union because the Court of Justice keeps itself away from that issue, by using exclusively the argumentation of the legal basis.[17]

Therefore, the other above-mentioned judgments of the Court of Justice return to be central. In such decisions, alongside the solution of the concrete case concerning the treatment of fixed-term workers, it is stated that the action of the Union cannot cover measures such as 'the equivalence of all or some of the constituent parts of pay and/or the level of pay in the Member States, or the setting of a minimum guaranteed Community wage' since this would 'amount to direct interference by Community law in the determination of pay within the Community'.[18] Or, again, it is explained that 'fixing the level of wages falls within the contractual freedom of the social partners at a national level and within the relevant competence of Member States'.[19]

Summarizing, therefore, from the case-law of the Court of Justice it is clear that the European Union cannot intervene on the following aspects of pay.

A) The standardization of the constituent elements of wages.

[12] CJEU, Case C-620/18, *Hungary* v *European Parliament* [2018].
[13] CJEU, Case C-620/18, *Hungary* v *European Parliament*, [2018], paragraph 36.
[14] CJEU, Case C-620/18, *Hungary* v *European Parliament*, [2018], paragraph 69.
[15] 'With respect to the entirety, excepting only supplementary occupational retirement pension schemes, of the terms and conditions of employment linked to pay, which includes the determination of the amount of that pay'. Therefore 'that directive … entails direct interference of EU law in the determination of pay'. CJEU, Case C-620/18, *Hungary* v *European Parliament*, [2018], paragraph 74.
[16] CJEU, Case C-620/18, *Hungary* v *European Parliament*, [2018], paragraph 80.
[17] CJEU, Case C-620/18, *Hungary* v *European Parliament*, [2018], paragraph 84, according to which 'the contested directive was, correctly, adopted on the legal basis of Article 53(1) and Article 62 TFEU, and … the adoption of that directive was not contrary to Article 153(5) TFEU'.
[18] CJEU (Grand Chamber), Case C-268/06, *Impact* [2006], paragraph 124.
[19] CJEU (Grand Chamber), Case C-307/05, *Del Cerro Alonso v. Osakidetza-Servicio Vasco de Salud* [2005], paragraph 40.

B) The determination and standardization of wage levels.

C) The setting of a minimum guaranteed EU wage.

These case-law approaches do not seem limited to the discipline of atypical work but have a general value. Therefore, returning to the previous metaphor, these are precisely the tools that must remain in the 'toolbox' of the domestic regulation and cannot be traced back and linked to the working conditions referred to in Article 153.2 TFEU.

3. Some concerns about Article 7 of the proposal.

Here it is first of all necessary to verify that the proposed directive does not affect one of the just indicated profiles. To carry out this analysis, one has to distinguish between the provisions of the proposal applicable to the Member States that do not have a statutory minimum wage and those concerning the countries in which some statutory provisions on minimum wage exist. As it will be seen shortly, while there is no objection to the issue of competence, as regards to the rules applicable to countries without a statutory minimum wage, at least a provision of the part of the directive which applies to countries that have a statutory minimum wage (or aspire to have it) may cause some perplexed reactions. Article 7 provides for that the 'Member States shall take the necessary measures to ensure that the social partners are involved in a timely and effective manner in statutory minimum wage setting and updating' and therefore requires that the States, in the event it has not been already provided, give the social partners a leading role in setting and updating the statutory minimum wage.

At this point, it is good to open a parenthesis. As regards to the role played by the social partners in legislation on minimum wages, it is known that the most common models in Europe are through negotiation and thorough consultation. In the former, the social actors are an integral part of the body that sets the minimum wage.[20] In the latter model, however, the social partners are only consulted by the institutional body without being part of it.[21] On closer inspection, there is also a third model, less widespread, which could be defined as unilateral, namely the one in which the Parliament (or the Government) sets the minimum wage without even consulting the social partners.[22]

[20] Or they directly set minimum wages.

[21] *See* Bavaro V., *Il salario minimo legale fra* Jobs Act *e dottrina dell'austerità*, in *Quaderni di rassegna sindacale*, 4, 2014, 70.

[22] *See* Eurofound, *Statutory minimum wages in the EU 2016*, Dublin, 2016, which refers to the existing rules on this matter in the EU Member States. Summarizing the report, in some countries the social partners negotiate and decide independently on the minimum wage level and the state implements it with a legal source. This is the case of Belgium that does not have a statutory minimum wage, and the social partners negotiate the minimum wage in the "Conseil National du Travail". In some countries, the social partners negotiate on the minimum wage and the state only decides when they do not reach an agreement, as in the Slovak Republic and the Czech Republic. In all the other EU countries, the social partners are consulted as in France but the final decision on minimum wage increase is taken by the state. In Ireland, an independent Low Pay Commission, with some members appointed by the social partners (although not delegated by their organizations) and academics, proposes to raise the minimum wage each year. The state may, however, depart from these recommendations.

Then, if the directive were approved without amendments, Article 7 would prevent legal mechanisms for setting minimum wages that do not contemplate the involvement of the social partners and, consequently, would require countries that have not already provided for such mechanisms to amend their national laws in the direction of assigning an at least consultative role to the social partners. However, this provision seems to exceed the competence of the Union since it affects a profile closely related to the determination of wage levels, on which, as mentioned, according to the decisions of the Court of Justice, the European Union cannot intervene. In a few words, Article 153 TFEU does not seem that it can be interpreted as meaning that the Union, despite having very limited competence in the field of pay can impose on the Member States the model of legislation on minimum wages even only regarding the role that the social partners shall play. Moreover, the fact that the aim of the directive is precisely to impose constraints of this kind, relating to the choice of the model of wage legislation, is also evident from the detailed explanation of the specific provisions of the proposal. The explanation concerning Article 7 says that such a provision '*requires the Member States to involve social partners in the definition of the criteria referred to in Article 5, the updates of minimum wages, the establishment of variations and deductions mentioned in Article 6, and the collection of data and carrying out studies in the field*'.[23] These are crucial aspects of the minimum wage, since it is a question, in the former case, of participating in the development of the criteria to be taken into consideration for wage-setting and updating wages; [24] in the latter, to possibly provide deductions again by law 'that reduce the remuneration paid to workers to a level below that of the statutory minimum wage'.[25]

4. The provisions of the proposal that apply to Italy and collective bargaining on wages.

At this point, it is appropriate to go beyond the issue of Member State/European Union competence.

As far as countries that do not have a statutory discipline on the subject are concerned, such as Italy, the proposed directive on wages is characterized by an implicit admission of weakness where it states that 'nothing in this Directive shall be construed as imposing an obligation on the Member States where wage setting is ensured exclusively via collective agreements ... to make the collective agreements universally applicable'. This is provided for in Article 1.3 of the proposal and anticipates that all the provisions applicable to countries in which there is no legislation on minimum wage do not attribute any obligation to implement EU law to the social partners if collective agreements are not universally applicable. Indeed,

[23] The italics are mine.
[24] According to Article 5.2, those criteria shall include the following elements: the purchasing power of statutory minimum wages, taking into account the cost of living and the contribution of taxes and social benefits; the general level of gross wages and their distribution; the growth rate of gross wages; labour productivity developments.
[25] Article 6, paragraph 2.

looking at the provisions of the proposal, prudently none of the duties deriving from the EU source is placed on the charge of collective bargaining.

The general provisions apply both to countries that do not have a legal minimum wage and to those that have passed legislation on the matter.

Among these, apart from the defining rules, the aim of the directive stands out, i.e. 'setting adequate levels of minimum wages' and guaranteeing 'access of workers to minimum wage protection, in the form of wages set out by collective agreements' (Article 1.1),[26] in addition to the provision on the promotion of collective bargaining (Article 4.1), where, in order to increase the collective bargaining coverage, Member States shall provide for two measures: 1) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage setting and 2) encourage constructive, meaningful and informed negotiations on wages among social partners.

On the contrary, the provision according to which the States shall establish by law a framework of conditions favourable to collective bargaining and define an action plan to promote the same bargaining concerns only the countries where there is a collective bargaining coverage of less than 70% (Article 4.2).

As has been already mentioned, therefore, the collective source is not called upon to implement any aim of the directive. So that the two above-indicated general measures shall be implemented by the Member States through legal sources, at least in countries such as Italy where collective bargaining does not have the universal applicability necessary to implement EU secondary sources.[27] For this reason, even Article 13, which allows for the implementation of the directive to be entrusted to the social partners upon their joint request, cannot be applied in Italy.

The horizontal provisions (Articles 9-11) must be added to these. They apply to all the countries with slight differences depending on whether or not such countries have legislation on minimum wages.[28] Leaving aside the provision on public procurement which I will return to shortly, attention must be paid to Article 10. Based on this provision, Member States are required to develop 'effective data collection tools to monitor the coverage and adequacy of minimum wages' and to report to the Commission on an annual basis a set of differentiated information according to the presence or not of statutory minimum wages. As regards to the wage protection provided exclusively by collective agreements, the Member States shall communicate to the Commission: a) the wage distribution weighted by the share of covered workers; b) the rate of collective bargaining coverage; c) the level of wages for workers not having minimum wage protection provided by collective agreements and its relation to the level of wages of workers having such minimum protection.[29] Added to this is the duty for

[26] On these profiles, *see* Menegatti E., *Il salario minimo nel quadro europeo e comparato. A proposito della proposta di direttiva relativa a salari minimi adeguati nell'Unione europea*, in *Diritto delle Relazioni Industriali*, 1, 2021, 41-58.
[27] On the issue of collective bargaining with a limited applicability, albeit from a different perspective, *see* Ratti L., *La proposta di direttiva sui salari minimi adeguati nella prospettiva di contrasto all'in-work poverty*, in *Diritto delle Relazioni Industriali*, 1, 2021, 59-76.
[28] On the horizontal provisions *see* Proia G., *La proposta di direttiva sull'adeguatezza dei salari minimi*, in *Diritto delle Relazioni Industriali*, 1, 2021, 26-40.
[29] The provision concerning statutory minimum wages is very similar. In such a case Member States shall report the following data to the Commission: a) the level of the statutory minimum wage and the share of workers covered by it; b) the existing variations and the share of workers covered by them; c) the existing deductions;

the Member States that information regarding minimum wage protection, including collective agreements and wage provisions therein, is transparent and publicly accessible.[30]

Therefore, the implementation duties imposed on Italy are only apparently marginal. The legislator will have to intervene while the trade unions will not since their sources, as mentioned, are unable to implement the supranational provisions.

Moreover, the Italian trade union system is regulated in this matter by the Pact of the Factory of 2018, which assigns to the national collective agreements the setting of the two new "containers" of pay, namely the overall wage (TEC) and the minimum wage (TEM). The former treatment includes the latter, together with all those economic treatments that the national collective agreement shall qualify as common to all workers in the concerned sector, regardless of the level of bargaining to which the same national collective agreement will entrust the discipline.[31] According to these clauses, the national collective agreement plays a dual role: on the one hand, it is the instrument for regulating the TEM; on the other hand, it is the "director" of the additional economic factors making up the TEC, in the sense that it is called to identify the common treatments in the concerned sector, by deciding whether to regulate them directly or entrust their discipline to the firm-level collective bargaining.

TEC and TEM do not seem to shift the terms of the matter, as case law already takes into account the minimum wages set by collective agreements.[32] Thus, both the difficulty of the Italian trade union system to self-reform and the fact that such a system cannot deal with the implementation of a European directive on minimum wages paves the way for a statutory intervention, the outlines of which are still to be defined.

5. The possible influence on the Italian legislation: from the field of application to the centrality of the legal reference to collective agreements.

In addition to the articles that could affect the Italian legal order whether it had to decide to adopt legislation on minimum wages,[33] there are two other provisions of the proposed directive that could affect our legal order as regards to the current legislation. They are Article 2 and Article 6.1. The former provision concerns the scope of the directive which applies to 'workers in the Union who have an employment contract or employment relationship as defined by law, collective agreements or practice in force in each Member State, with consideration to the case-law of the Court of Justice of the European Union'. The provision is decisive but it is even more important for Italy that, despite not having general legislation on minimum wages, presents a series of statutory provisions, to which it is important to understand whether or not the directive of the Union shall apply.

d) the rate of collective bargaining coverage.

[30] Reference has to be made to Article 10.3, according to which 'Member States shall ensure that information regarding minimum wage protection, including collective agreements and wage provisions therein, is transparent and publicly accessible'.

[31] Paragraph 5.f, Intersectorial Agreement of 2018.

[32] Pascucci P., *Giusta retribuzione e contratti di lavoro. Verso un salario minimo legale?*, Franco Angeli, Milano, 2018, 104.

[33] Please refer to what will be said in paragraph 5.

Whereas clause n° 17 of the proposal shows that the scope of the directive is broad but it is not so broad as to include self-employment. As a matter of fact, 'genuinely self-employed persons do not fall within the scope of this Directive since they do not fulfil' the criteria established by the Court of Justice for determining the status of a worker, which are well summarised in the *FNV Kunsten* decision.[34]

Therefore, none of the provisions of the directive would apply to Italian legislation concerning the remuneration of some categories of self-employed workers, such as Article 1.1, Law 233/2012 on independent journalistic work,[35] Article 13-bis, Law 247/2012 on self-employed work performed within and outside professional associations,[36] and Article 47-quater, Legislative Decree 81/2015 on independent delivery workers.[37]

More attention should be paid, however, to those cases in which legislation refers to dependent work by not intervening directly to set minimum wage but assigning this function to the collective agreements concluded by the comparatively most representative social partners at the national level.

The most important case is that of co-operative work. The provision relating to this is Article 7.4, Law Decree 248/2007, converted into Law 31/2008.[38] The legislator considers

[34] 'It is settled case-law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration': CJEU, Case C-413/13, *FNV Kunsten Informatie en Media*, [2013], paragraph 34. On this profile, it is allowed to refer to Delfino M., *Statutory minimum wage and subordination.* FNV Kunsten Informatie *Judgment and Beyond*, in Laga M., Bellomo S., Gundt N., Miranda Boto J.M. (eds.), *Labour law and Social rights in Europe: the Jurisprudence of the International Courts*, Gdańsk University Press, Gdańsk, 2017, 39-46.

[35] The law provides for the payment of a "fair compensation" proportionate to the quantity and quality of the work performed. In addition, fair remuneration shall be determined taking into account consistency with the treatments provided for by the national collective bargaining, which applies to journalists with a contract of employment. Fair compensation is set by the Commission referred to in Article 2, Law 233/2012, established at the Department for Information and Publishing of the Presidency of the Council of Ministers and chaired by the Secretary to the Presidency of the Council with responsibility for information. The Commission has an atypical equal composition since of its seven members only two are representatives of the social partners; three, including the chairman, are members or representatives of the Government; one member is appointed by the National Council of the Journalists Association and another one by the National Insurance Institute for Italian Journalists.

[36] The provision refers to lawyers enrolled in the register who provide professional services (under a self-employment status) regulated by agreements concerning the performance of the activities typical of the legal profession. These services shall be performed in favour of banking and insurance companies, as well as companies that do not fall within the categories of micro or small or medium-sized enterprises. Article 13-bis.2 requires that the professional is entitled of fair compensation, which has to be proportionate to the quality and quantity of the work performed as well as to the content and characteristics of the legal service, without any reference to sufficiency. Instead, a difference from self-employed journalists is that there is no mechanism for determining the compensation and its setting is left to some conventions, which however shall take into account the parameters contained in the regulation referred to in the decree of the Minister of justice adopted under Article 13.6, Law 247/2012.

[37] 1. The collective agreements concluded by the comparatively most representative trade union and employers' organizations at the national level can define criteria for determining the overall compensation. Such criteria shall take into account the methods of performance of the service and the organization of the client.
2. Lacking these agreements, the workers referred to in Article 47-bis cannot be remunerated on the basis of the deliveries made and the same workers shall be guaranteed with a minimum hourly compensation parameterized to minimum wages set by national collective agreements of similar or equivalent sectors concluded by the comparatively most representative trade unions and employers' organizations at the national level.

[38] According to this provision, in the presence of a plurality of collective agreements of the same sector, the cooperative companies that carry out activities included in the scope of application of those agreements shall

as the reference pay that is provided in the collective agreements concluded by the trade unions that have higher representativeness in the concerned sector.[39]

If this intervention were considered a statutory minimum wage, although limited to some workers, the proposed directive would be applicable with the consequence of having to verify the compliance of the domestic discipline with the provisions of EU law. However, some indications, in EU and domestic law, suggest a negative answer to the question. Indeed, from the provisions of the proposal concerning minimum wages, including the whereas clause, it is clear that the European Union, when it refers to the statutory minimum wage, is thinking of a model in which this minimum is set directly by the law or is set, directly or indirectly (i.e. by delegating to a body established for this purposes), by the legal source and not instead to a reference to collective bargaining. The Italian Constitutional Court seems to agree. This Court, in affirming the legitimacy of the law on cooperative work, ruled that the collective agreements referred to in Article 7.4, Law Decree 248/2007 and more precisely the total minimum wage provided therein can be considered as an external parameter of commensuration by the judge in defining the proportionality and sufficiency of pay according to Article 36 of the Constitution.[40] Therefore, even the Constitutional Court does not consider this to be a provision introducing a statutory minimum wage for cooperative workers but rather an article that identifies in those collective agreements the external parameter of proportionate and sufficient pay.

A similar discourse can be conducted for workers in the third sector. It should be remembered that the profiles on which the Legislative Decree 3 July 2017 n° 112 (the so-called Social Enterprise Reform) are twofold. First, the decree provides that the workers of the social enterprise have the right to an economic and regulatory treatment not less than that provided for by the collective agreements referred to in Article 51 of Legislative Decree 81/2015.[41] The second profile concerns only social enterprises, one of the types of bodies operating in the third sector,[42] for which a ban on even indirect distribution of profits is established and the distribution of profits is equated with the payment to the dependent workers or self-employed salaries or remuneration higher than 40% compared to those provided, for the same qualifications, by the collective agreements referred to in Article 51 of Legislative Decree 81/2015 except for proven needs relating to the need to acquire specific skills to carry out activities of general interest.[43] However, this is not minimum wage

apply to their working members the overall remuneration not lower than those set by the collective agreements stipulated by the comparatively most representative employers and trade union's organizations at national level in the sector.

[39] Bellavista A., *Il salario minimo legale*, in *Diritto delle Relazioni Industriali*, 3, 2014, 741-755 and Ichino P., *La nozione di giusta retribuzione nell'articolo 36 della Costituzione*, in *Rivista Italiana di Diritto del Lavoro*, 4, 2010, I, 719-768.

[40] Constitutional Court's decision 50/2015, paragraph 5.3.

[41] Article 16, Legislative Decree 112/2017.

[42] That is, according to Article 1.1, Legislative Decree 112/2017, private bodies that carry out business activity of general interest, non-profit, for civic, solidarity, and social utility purposes on a stable and main basis, by adopting responsible and transparent management and favouring the widest involvement in their activities of workers, users and other interested individuals.

[43] Article 3, Legislative Decree 112/2017. In these cases, the wage protection of workers remains in the background since the rationale is above all to avoid the abuse of the advantages provided by the legislator for carrying out activities characterized by purposes of primary social importance: Zoppoli L., *L'«equo compenso» tra contratto collettivo e legge*, in Carabelli U., Fassina L. (eds.), *Il lavoro autonomo e il lavoro agile alla luce della legge n. 81/2017*, Ediesse, Roma, 2018, 73.

legislation either, so that there would be no problem of compliance with the directive once it was passed.

On the other hand, the issue of minimum wages appears different concerning work in public procurement because, in this area, there is a specific provision in the proposed directive, Article 9, i.e., as mentioned, one of the horizontal provisions. According to that article, 'Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist'.

Looking at the rules of the 2016 public contracts code[44] on this profile, the economic (and regulatory) treatment provided for by the collective agreements concluded by the comparatively most representative employees' and employers' associations at the national level is considered crucial in the procurement discipline.[45]

In particular, this treatment has the following characteristics:

1) It is a principle for the award and execution of contracts,[46] to be applied even in the case of subcontracts.[47]
2) It is crucial in assessing the adequacy of the offer with which you participate in the tender,[48] or the obligations regarding subcontracting.
3) It is decisive for participation in the tender procedure.[49]

Finally, Article 50 of the code of the public contract provides that for the awarding of concession contracts and contracts for works and services other than those of an intellectual nature, the calls for tender notices and invitations insert specific social clauses aimed at promoting employment stability of the staff, providing for the application by the successful bidder of the national collective agreements referred to in Article 51 of Legislative Decree 81/2015. It should be emphasized that in the latter case the reference is not generically to the national or territorial collective agreements concluded by the comparatively most representative associations of employers and workers at the national level but to the collective agreements, and moreover only the sectorial ones, provided for by Article 51, Legislative Decree 81/2015, thus highlighting a strong analogy with the provisions regarding work in the third sector.

[44] The reference is to Legislative Decree 18 April 2016 n° 50, as amended by Legislative Decree 19 April 2017 n° 56.

[45] Izzi D., *Lavoro negli appalti e dumping salariale*, Giappichelli, Torino, 2018, 105-113 and Forlivesi M., *La rappresentatività datoriale: funzioni, modelli, indici di accertamento*, in *Lavoro e Diritto*, 3, 2018, 529.

[46] The national and territorial collective agreements in force for the sector and the area in which the work is performed are applied to the personnel employed in the works, services and supplies within public procurement: Article 30.4, Legislative Decree 50/2016, as amended by Article 20.1.a, of Legislative Decree 19 April 2017 n° 56.

[47] The legislator reiterates that the contractor is required to fully observe the economic and regulatory treatment established by the national and territorial collective agreements in force for the sector and the area in which the services are performed (Article 105.9, Legislative Decree 50/2016).

[48] The offer is considered abnormally low if the contracting authority has ascertained non-compliance with the environmental, social and labour duties established by EU and domestic legislation, and also by collective agreements (Article 30.4, which is recalled by Article 97.5, Legislative Decree 50/2016).

[49] This is because the economic operator can be excluded when the contracting authority demonstrates the presence of serious infringements duly ascertained to the rules on health and safety at work as well as to the duties referred to in Article 30.3 (*see* Article 80.5.a, Legislative Decree 50/2016).

The centrality of collective bargaining in determining minimum wages in public contracts and concessions makes Italian legislation compliant with the relevant provision of the proposed directive. Therefore, if the directive were approved in the version that has been described here, it would be difficult to repeal the domestic provisions contained in the code of the public contracts.

A different issue is the possibility to amend those rules so that it would be legitimate from a supranational point of view if the Italian legal order intervened on the bargaining levels of and/or otherwise selected the collective agreements because the EU secondary source does not deal with these profiles. Therefore, the domestic legislator, after the possible approval of the directive, could reform the provisions on the matter, for example by standardizing the rules on work in public procurement with those on cooperative work.

6. The different ways to implement the aims of the directive in Italy.

It seems very evident from what has been said so far that the appearance of the proposed directive is deceiving. The main consequence for the Italian legal order would not be the need to approve a law on minimum wages, which is being discussed in Parliament where some bills have been presented,[50] being conscious that, if one chose to follow this path, the presence of such a directive would impose some constraints. Rather, if the minimum wage were not intended to be regulated by law, the legislator would not be exempted from regulating the field of pay. As we have seen, the directive also imposes some duties on domestic systems without statutory minimum wages, which collective bargaining would not be able to implement in the Italian order. Therefore, given that it would not be necessary to implement Article 7, which, as mentioned, seems to exceed the competence of the Union, there are two options: either the Italian legal order is considered as already compliant with the provisions contained in the proposed directive or a domestic statutory intervention is

[50] In this legislature, the Five Star Movement proposed a bill on minimum wages (12 July 2018 n° 658, entitled Provisions for the establishment of the minimum hourly wage) quite different from that presented in the previous legislature (27 November 2014 n° 1697), which is essentially aimed at generalizing the mechanism set up in co-operative work. The new bill contemplates the value of 9 euros per hour gross of social security contributions as a minimum wage threshold. At the same time, it considers as the proportionate and sufficient overall remuneration that one set in the national collective agreement in force for the sector in which work is carried out, which was concluded by the most representative employers 'and workers' associations at the national level defined according to the procedure for the appointment of the representatives in the CNEL, i.e. taking into account the extent and diffusion of their organizational structures, the number of their members, their effective participation in the of national collective agreements and the settlement of individual and collective labour disputes. And this provision should also extend to hetero-organized collaborations according to Article 2, Legislative Decree 81/2015. In the 18th legislature, another bill was presented (3 May 2018 n° 310), entitled Establishment of the minimum hourly wage, on the initiative of some senators of the centre-left opposition to the Five Star Movement-League Administration (Laus, Astorre, Boldrini, Cirinnà, Cucca, Garavini, Giacobbe, Manca, Misiani and Pittella). This bill also chooses to set the minimum hourly wage at 9 euros net per hour, to be increased every year according to Istat parameters. However, it is proposed to assign a leading role to a ministerial decree which, after an agreement with the comparatively most representative employers' and workers' associations at the national level, should identify the contracts to which the discipline of the minimum hourly wage should be extended, as well as the cases of exclusion of the same discipline. Failure to comply with the proposed provisions by employers is hit with an administrative fine ranging from a minimum of 5,000 to a maximum of 15,000 euros.

necessary. It has already been said that, regarding public procurement, there is a (casual) compliance with the corresponding provision of the directive, while the situation is different for the other provisions, from the general provisions to the horizontal ones, to the rules concerning the countries where minimum wages are set by collective bargaining. Indeed, it should be noted that it is up to the Member States to implement some aims such as to a) promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage-setting; b) encourage constructive, meaningful, and informed negotiations on wages among social partners (Article 4.1); c) develop effective data collection tools to monitor the coverage and adequacy of minimum wages (Article 10.1); d) ensure that information regarding minimum wage protection, including collective agreements and wage provisions therein, is transparent and publicly accessible (Article 10.3). On closer inspection, the last two aims could be considered to have already been achieved thanks to the presence of the CNEL, a body of constitutional importance, which is responsible, among other things, for collecting the concluded national collective agreements.[51] On the contrary, the first two aims, actually rather generic, do not seem to be pursued by Italian legislation. The generalization of the mechanism for determining the minimums provided for cooperative work or the selective recourse to collective bargaining would facilitate the achievement of the first two aims. Of course, this is not essential. Alternatively, one could: 1) intervene with some statutory provisions aimed at supporting the social partners that would achieve the same aims with different means; or 2) decide to introduce a statutory minimum wage, which, however, would bring with it the need not only to implement the aforementioned aims but also to fulfil the EU duties contained in the part of the directive reserved precisely for legal minimum wages.

However, one fact is clear. The proposed directive has the merit of having rekindled the lights on the issue of statutory minimum wage, at the centre of attention of the political debate, as shown by the bills mentioned above but also case law because the highest Italian courts, i.e. the Constitutional Court and the Corte di Cassazione, seem to support an intervention by the legislator on the matter, naturally limiting themselves only to tracing the paths that can be followed. An example of this is the decision of the Corte di Cassazione of 20 February 2019 n° 4951 on minimum wages for cooperative work, according to which, following the judgment of the Constitutional Court no. 50 of 2015, the fact that over time collective bargaining has been the source implementing the protection referred to in Article 36 of the Constitution, does not prevent the legislator from intervening to set the sufficient pay, through for instance the provision of statutory minimum wage, suggested by the ILO as a policy to ensure a fair wage.[52] The impression is that the approval of the directive, and ultimately the implementation of its provisions in Italy, could constitute an opportunity to address the issue of statutory intervention, proposing again the choice between a general law

[51] Article 10, l. December 30, 1986, n. 936, a source that implements Article 99 of the Constitution, in specifying the scope of the matters in which the CNEL activity insists, refers to the regulatory and remuneration structures expressed by collective bargaining and to the keeping of the National Archive of collective agreements.
[52] That is, in the matter under examination, the overall remuneration not lower than those set in the collective agreements concluded by the comparatively most representative employers and trade union organizations at the national level in the sector (Article 7.4, Law Decree 248 of 2007, converted into Law 31 of 2008, precisely on cooperative work on which I focused above).

on trade union representation and representativeness, a 'lighter' law to support collective bargaining or the introduction of proper statutory minimum wage.

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